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Supreme Court of the United States

WILLIAM F. ROKEY (PLAINTIFF) AND HAROLD McGOWND, ET AL. (INTERVENORS),

Petitioners,

vs.

DAY & ZIMMERMANN, INC.,

Respondent.

PETITION FOR REVIEW ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

I.

STATEMENT OF THE MATTER INVOLVED

William F. Rokey, for himself and in behalf of other employees similarly situated, brought this action in the District Court of the United States for the Southern District of Iowa against the respondent, Day & Zimmermann, Inc., under the Fair Labor Standards Act, 29 U. S. C. A. Section 201 et seq., to recover overtime, liquidated damages and attorneys' fees. Nine employees, claiming to be similarly situated, intervened. On motion, one

of the intervenors dismissed without prejudice. The case was tried to a jury upon demand of respondent and at the close of all the evidence, both parties moved for a directed verdict. The motion of petitioners was overruled and that of respondent sustained, resulting in a judgment for respondent against petitioners, from which an appeal was taken to the Circuit Court of Appeals for the Eighth Circuit.

Respondent, Day & Zimmermann, Inc., was at all times in question the operator of the Iowa Ordnance Plant near Burlington, Iowa. It maintained a fire fighting force in which petitioners were employed. Petitioners worked two to four shifts a week, each shift being of twenty-four hours duration, commencing at 8:00 A. M. when the men punched in on a time clock and ending at 8:00 A. M. the following morning, when they punched out. They were never on duty two consecutive shifts. Respondent required them to be at the fire station for the full twenty-four hour period of their shift except as they might be called out on fire alarm or for other duties.

Petitioners were paid at hourly rate for sixteen hours, viz., from 8:00 A. M. to 12:00 midnight and were not paid for the time between midnight and the check out time at 8:00 in the morning unless they were called out and actually left the fire station to answer an alarm or for stand-by work during such period. This action is upon a demand of petitioners for compensation for the additional period of eight hours in each shift which were called by respondent "sleeping time."

The period for which unpaid compensation is demanded began on September 5, 1943, when a so-called

"two platoon" system became effective. Prior to that time petitioners had been employed under an operating plan in which there were three shifts of eight hours each in each twenty-four hour period, each fireman being on duty one shift of eight hours per day for some five or six days per week. Under that plan they were paid overtime for all hours over forty in which they were on shift in each work week. Sometime prior to September 5, 1943, the plan known as the "two platoon" system was placed before the firemen for vote. The men voted "yes" for its adoption, feeling, as petitioners testify, that if they wanted to continue to hold their jobs they were required to so vote (R. 23, 34, 40, 49, 50, 54, 55).

Respondent furnished in each station eating facilities, including electric refrigerators and stoves, so that firemen might prepare their meals, although they provided their own food. There was a recreation room where they were allowed, while on shift, and at such times as they were not performing prescribed duties, to play dominoes, cards, read or listen to the radio. Bunks and bedding were furnished and the men were permitted to go to bed in the dormitory any time after 10:00 P. M., subject to being called out for night alarm or other work.

The men were not paid for that portion of each shift which consisted of the eight hour period between midnight and 8:00 A. M. except for such time during such period as they were actually away from the station in response to an alarm.

If the men punched out or left before eight o'clock in the morning they were docked for the time they were not there in the twenty-four hour period (R. 19, 26, 29, 30, 47).

Respondent admits in its answer that petitioners were engaged in the production of goods for commerce (R. 4) and entitled to the benefits of the Fair Labor Standards Act for such hours as they worked. The only issue in the case is whether, under that statute, the petitioners are entitled to pay for the full eight hour period between midnight and 8:00 A. M., during which time they were required to be on respondent's premises.

II.

BASIS FOR JURISDICTION

Authority for the jurisdiction of this court appears in U. S. Compiled Statutes, Sec. 1217; 28 U. S. C. A. Sec. 347; Judicial Code Sec. 240 as amended.

III.

THE QUESTION PRESENTED

Are members of a fire fighting force, to whose employment the Fair Labor Standards Act of 1938 is admittedly applicable, entitled to compensation (including overtime pay and liquidated damages) for time during which they were required to be on the employer's premises for the purpose of fire protection, even though during a portion of such time they were permitted to sleep, subject at all times to respond to an alarm?

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals has in this case decided an important question of federal law which has not been, but should be settled by this Court.

2. The Circuit Court of Appeals has decided in this case a federal question in a way probably in conflict with applicable decisions of this Court.

Wherefore, your petitioners pray this Honorable Court to require by writ of certiorari that this cause be certified to the Supreme Court for determination by it as provided by statute.

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Supreme Court of the United States

WILLIAM F. ROKEY (PLAINTIFF) AND HAROLD McGOWND, ET AL. (INTERVENORS),

Petitioners,

vs.

DAY & ZIMMERMANN, INC.,

Respondent.

BRIEF AND ARGUMENT OF PETITIONERS

REFERENCE TO OFFICIAL REPORT

The decision of the Circuit Court of Appeals of the Eighth Circuit in this case is reported in 157 Federal 2nd., page 734.

GROUNDS FOR JURISDICTION OF THIS COURT

1. The Circuit Court of Appeals has in this case decided an important question of federal law which has not been, but should be settled by this Court.

2. The Circuit Court of Appeals has decided in this case a federal question in a way probably in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE

The facts essential to recovery by the petitioners herein are undisputed. It is admitted that the petitioners were employed by the respondent in its fire department; that the employer-employee relationship contemplated by the Fair Labor Standards Act was present; that the provisions of said Act are applicable to the employment in question (R. 4). There is an agreement as to the hourly rate of pay (R. 4), the number of shifts (periods) of twenty-four hours each that the men were stationed at the fire station during each work week and the amount of pay received by each employee involved herein (Exhibit A; R. 57-83).

There is no question that the men were required to be on the premises of respondent during the full twenty-four hour period of each shift and yet were paid for only sixteen hours; for the period from midnight to 8:00 A. M. they received no pay except during the time they were actually away from the fire station in response to an alarm or on stand-by duty (R. 31, 32, 36, 44, 47, 54). If they left the premises or punched out before 8:00 A. M. they were docked for all the time thus taken from the twenty-four hour shift (R. 19, 26, 29, 30, 47).

It is true that during the eight hour period in question petitioners were permitted to sleep, subject to the performance of certain duties, and subject to numerous disturbances incident to the particular location and the character of the work being carried on there. As illustrative of the duties required by them during the so-called "sleeping time" for which they received no pay, they were required to answer stand-by calls or fire alarm (for which they received pay only when away

from the station) (R. 25, 26); radio detail (R. 20, 24, 35); roll up the bedding and put it in place (R. 19, 32, 41, 43, 44); clean up quarters (R. 41, 43); clean up equipment, apparatus and trucks (R. 36, 41, 43, 51); relief duty for men on stand-by work (R. 94); go to other stations for reports (R. 20, 94) or to pick up stand-by men (R. 93, 94); to clean the boiler room and fire the furnace (R. 51); to attend a fire close to the plant, clean the trucks and reload (R. 94). They were required to get up at 7:00 A. M. (R. 44).

There is no dispute about the fact that the men were subject to orders at all times (R. 33) for which they received no pay except while away from the station (R. 32, 43, 44); that they furnished fire protection to the plant during the eight hours in question just the same as during the sixteen hour period for which they were paid (R. 44, 54, 133); that they were required to be at the station at all times (R. 31, 32, 36, 41, 44, 47); that during said eight hour period, when an alarm sounded. although they arose, dressed and made ready to respond to the alarm, they were not paid unless they actually left the station to fight the fire (R. 31, 32, 36, 38, 48, 141). Among the things otherwise disturbing and interrupting sleep were such noises as were made by Diesel engines on a nearby railroad switch track, the noise incident to the operation of the trucks in and out of the transportation building adjacent to the fire station and traffic on the main road into the plant, upon which road the station abutted (R. 32, 41).

The "two platoon" system became effective September 5, 1943 after the employees had indicated by "yes"

or "no" their approval thereof. However, the record shows that all of the petitioners voted "yes," with the thought that they must do so if they wanted to continue to hold their jobs (R. 23, 34, 40, 49, 50, 54, 55).

Over the objection of petitioners, respondent offered and there was admitted in evidence Interpretative Bulletin Number 13 of the United States Department of Labor with particular reference to paragraphs 6 and 7 thereof (R. 156) and a letter from William R. McComb, Deputy Administrator, United States Department of Labor, Wage and Hour and Public Contracts Divisions (R. 119, 124).

It appears that respondent had submitted the "two platoon" plan to the Wage and Hour Division of the Department of Labor and the letter from McComb just mentioned had responded as follows:

> "From the facts given I can advise you that the Administrator would not question the adoption of the two-platoon system and the payment to employees for 16 of the 24 hours they are on the company premises, provided that for the 8 hours when the employees are not to be regarded as working they are free to sleep, and provided, of course, that employees will be paid for any time during those 8 hours that they may be required for fire calls or fire fighting purposes, and provided that the arrangement is mutually satisfactory to the employer and the employees."

It is undisputed that the submission of the matter to the Department of Labor was ex parte and that neither petitioners herein nor any other members of the fire department participated therein.

It is undisputed that the Respondent was able under the "two platoon" system, to dispense with the services of some of its firemen. The effect of the adoption of the system, was, according to the testimony of the fire chief, a witness for Respondent, that "This new system would require fewer men than the other system. It would take from seventeen to nineteen less men." (R. 138.)

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in finding that the trial court was without error in overruling the motion of Plaintiffs (Petitioners here) and sustaining that of Defendant (Respondent here) for a directed verdict.

ARGUMENT

It appears to have been the theory of the Respondent that the trial court should direct a verdict because (1) the time in question, during at least a portion of which the Petitioners were permitted to sleep, was not working time and therefore not compensable time; (2) the so-called "two platoon" system had the approval of the Deputy Administrator of the Wage and Hour Division of the United States Department of Labor; and (3) the Petitioners had agreed to that arrangement.

It is our contention that if the time from midnight to 8:00 A. M. was compensable time under the provisions of the statute, Plaintiffs (Petitioners here) were entitled

to recover regardless of anything the Administrator may have said about the "two platoon" system or whether or not Petitioners had agreed to that arrangement.

It is by this time well settled that contracts between employers and employees subject to the Act and inconsistent with its provisions are illegal and void. *(Brooklyn Savings Bank vs. O'Neil,* 324 U. S. 697, 704 et seq., 65 S. Ct. 895, 1100 et seq., 89 L. Ed. 1296, *Johnson vs. Dierks Lumber and Coal Company,* 130 Fed. 2nd 115, 118, and cases cited.) We do not believe the Respondent would seriously dispute the right of Petitioners to recover if, under the statute, the time in question is compensable time, even though they had attempted to waive their rights.

In support of its theory that the time in question was not compensable, Respondent urged upon the court what is designated as Interpretative Bulletin Number 13 issued by the Wage and Hour Division. It was claimed that paragraphs 6 and 7 (R. 147-148) of that Bulletin sets out and interprets in the light of the statute "situations as in the instant case." However, in *Skidmore vs. Swift & Company,* 323 U. S. 134, 139, 65 S. Ct. 161, 164, 89 L. Ed. 125, where it was dealing with facts somewhat analogous to those in this case, this court said:

> "The facts of this case do not fall within any of the specific examples given, * * *. There are no statutory provisions as to what, if any, deference courts should pay to the Administrator's conclusions. And, while we have given them notice, we have had no occasion to try to prescribe their influence. The rulings of this Administrator are not

> reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes as an authoritative pronouncement of a higher court might do. * * *."

Doubtless recognizing the factual differences between the situations suggested in the Bulletin and the situation under the "two platoon" system in the instant case, Respondent urged upon the court the binding effect of the letter from William R. McComb, Deputy Administrator (R. 119-122), which had been obtained ex parte by Respondent in response to a letter from it. In the McComb letter, the Deputy Administrator said:

> "From the facts given I can advise you that the Administrator would not question the adoption of the two platoon system and the payment to employees * * *."

Respondent apparently regarded this statement of the Deputy Administrator as an approval of the plan and authority for its inauguration and maintenance. It is submitted that the most the Deputy Administrator intended was an assurance that the Department would not interfere by way of injuctive proceedings if the system which was outlined in the letter to him were put into effect.

We come now to the question of whether or not the time between midnight and 8:00 A. M. was working time within the meaning of the Act and therefore com-

pensable. The occupation of these Petitioners was that of firemen or fire fighters. As is well known, the duties incident to this occupation are not confined to fire fighting. Perhaps more important are the duties incumbent upon firemen to be at their posts at all times in anticipation of and prepared for an alarm. It is because of the performance of these duties that persons in other occupations can go about their work with assurance of safety or, during their sleeping time, rest in peace and without fear. It is without dispute in the record here that Petitioners were required by the Respondent to remain at their posts in the fire station on the premises at all times during their twenty-four hour shift, there being no distinction in this respect between the period from 8:00 A. M. to midnight and the period from midnight to 8:00 A. M. The record shows that the rule was that Petitioners were docked if they left the premises at any time prior to 8:00 A. M.

This court in the case of *Anderson vs. Mt. Clemens Pottery Company*, 90 L. Ed. 1114, ... U. S. ....., has given a definition of what is meant in the law by the term "statutory work week." In other words this court has defined what is compensable time under the statute. We quote the definition:

> "Since the statutory work week includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place, the time spent in these activities must be accorded appropriate compensation."

In the instant case there was no question of time required for employees to put themselves in readiness for work as there was in the Mt. Clemens case. The Pe-

titioners here were required at all times during their twenty-four hour shift to be ready for work. For this purpose, they were required to be at the fire house on Respondent's premises at all times. There is no room for the contention here, such as was made in the Mt. Clemens case, that the amount of recovery sought is uncertain and speculative. The time devoted by Petitioners to their jobs is in the record in detail and is undisputed. There is no conflict here, as in the Mt. Clemens case, between the claim made and the time clock records. There is no suggestion here of the application of the de minimis rule discussed in the Mt. Clemens case. The primary purpose of the employment of Petitioners was the service of fire protection to a huge ordnance plant. That service was furnished by the Petitioners twenty-four hours at a stretch. Throughout the entire twenty-four hour shift, whether performing physical labor or not, they were serving their employer by providing fire protection to the plant. They were at all times at their posts of duty under the mandate of their employer.

The Circuit Court of Appeals in the instant case (*Rokey vs. Day & Zimmermann,* 157 Fed. 2nd 734, 737) relies upon quotations from a specially concurring opinion of Judge Stone in the case of *Johnson vs. Dierks Lumber and Coal Company,* 130 Fed. 2nd 120, which contained statements inconsistent with the definition of compensable or working time as stated by this court in the Mt. Clemens case (supra). The Circuit Court of Appeals apparently adopted these views of the specially concurring opinion in the Dierks case, although it is clear enough that that was not the opinion of the same Circuit

Court of Appeals, but only the opinion of the specially concurring judge. He refers to the statement which we contend is inconsistent with this court's definition as "my view." If we turn to the decision of that same court in the Dierks case, we find that the opinion of the majority of the court contains this language:

> "We do not think the Act means that an employer may claim all an employee's time and compensate him for only part of it. An agreement to pay for only a part of the hours which an employee is required to serve is invalid."

We submit that if employees are entitled to recover under the circumstances involved in the Mt. Clemens case, certainly the right of these Petitioners to compensation for time which they were required to spend at their posts of duty on the premises of the employer cannot be denied such right, particularly where it is without question that the employer profited by the inauguration of the system under which this service was rendered.

This is not a "Portal to Portal" case. It is far stronger than that. It deals with an occupation which requires men to live apart from their families on the premises of their employer and at a particular spot thereon, alert and ready at all times to go into dangerous action for the protection of the employer's property and the lives of its thousands of employees. By their remaining there for a full twenty-four hour period they enabled their employer to dispense with the services of others in the same occupation. There was no difference during the twenty-four hour shift between one time and another, in respect to performance of the primary duty, viz., fire protection. That there should be drawn across their schedule

an arbitrary line, resulting in compensation to these men on one side and none on the other, is unconscionable, whether viewed in reference to the statute and the interpretative Mt. Clemens case or not.

The decision of the Court of Appeals, denying these men pay for a portion of the time spent in performing the duties of their occupation, is not in accord with the terms of the Act as defined by this court in the Mt. Clemens case. While this court dealt to some extent in the cases of *Skidmore vs. Swift and Company*[1], 323 U. S. 134, 65 S. Ct. 161, 89 L. Ed. 125; and *Armour and Company vs. Wantock*, 323 U. S. 126, 133, 65 S. Ct. 165, 168, 89 L. Ed. 120, with situations somewhat similar, there has been no decision as to the precise issue involved here. The question of the effect of the statute upon the so-called "two platoon" system in the operation of a fire department is an important question of federal law which should be determined by this court.

1. This court there said: "Whether in a concrete case such (waiting) time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court." It is to be noted that in the instant jury tried case application of this rule was precluded by reason of direction of the trial court to the jury to return a verdict for the Defendant, resulting in no findings being made. The record presents no dispute as to the fact that the time in question here was time during which Petitioners were "engaged to wait." This court made it clear in the Skidmore case that compensation for waiting time, and in a situation as is here involved, cannot be denied as a matter of law. On the other hand, the Court of Appeals in sustaining the trial court holds that waiting time does not fall within the Act as a matter of law.

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APPENDIX

PERTINENT STATUTE

Fair Labor Standards Act (1938).

Section 203(g), Title 29 U. S. C. A., provides:

> " 'Employ' includes to suffer or permit to work."

Section 207, Title 29 U. S. C. A., provides:

> "No employer shall * * * employ any of his employees who is engaged in commerce, or in the production of goods for commerce * * * (3) for a work week longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."